



## DEPARTMENT OF JUSTICE

### 28 CFR Part 16

#### [CPCLO Order No. 009-2021]

#### Privacy Act of 1974; Implementation

**AGENCY:** Office of Legal Policy, United States Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The United States Department of Justice (DOJ or Department), is finalizing with changes its Privacy Act exemption regulations for the system of records titled, “Judicial Nominations Files,” JUSTICE/OLP-002, which were published as a notice of proposed rulemaking (NPRM) on July 23, 2021. Specifically, the Department’s regulations will exempt the records maintained in JUSTICE/OLP-002 from one or more provisions of the Privacy Act.

**DATES:** This final rule is effective [INSERT DATE 30 AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Matrina Matthews, Executive Officer, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Room 4234, Washington, D.C. 20530-0001; telephone: (202) 616-0040; email: [matrina.matthews@usdoj.gov](mailto:matrina.matthews@usdoj.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

On July 14, 2021, the Office of Legal Policy (OLP) published in the Federal Register a System of Records Notice (SORN) for an OLP system of records titled, “Judicial Nominations Files,” JUSTICE/OLP-002. 86 FR 37192. On July 23, 2021, the Department published a notice of proposed rulemaking (NPRM) proposing to exempt records maintained in JUSTICE/OLP-002 from certain provisions of the Privacy Act

pursuant to 5 U.S.C. 552a(k), and inviting public comment on the proposed exemptions. 86 FR 38955. The comment period was open through August 13, 2021, for the SORN and through August 23, 2021, for the NPRM. The Department received no comments on the proposed rule. After providing the opportunity for public comment, exemptions necessary to protect the ability of OLP to do its judicial nomination functions have been codified in this final rule as proposed in the NPRM.

The exemptions are necessary because certain classified information may be maintained in JUSTICE/OLP-002, including but not limited to, records related to a potential nominee that maintained a previous or current position with access to classified information and/or assigned to a national security sensitive position. Moreover, given the law enforcement information that may be discovered as part of the nomination investigation and/or evaluations, certain investigatory materials for law enforcement purposes may be maintained in this system of records. In addition, investigatory material may also be used in determining suitability, eligibility, or qualification decisions, and such information may require exemption to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Department under an express promise that the identity of the source would be held in confidence. Finally, the Department also utilizes various examination materials to determine individual qualifications for appointment, which if disclosed, could compromise the objectivity or fairness of the Department's examination and vetting process.

### **Response to Public Comments**

In its Judicial Nominations Files SORN, published on July 14, 2021, and its Judicial Nominations Files NPRM, published on July 23, 2021, the Department invited public comment. The comment period for the SORN closed on August 13, 2021, and the comment period for the NPRM closed on August 23, 2021. The Department received no comments. Because no comments were submitted, and because OLP continues to assert

the rationales in support of the exemptions as stated in the NPRM, the Department adopts in this final rule the exemptions and rationales proposed in the NPRM.

#### **Executive Orders 12866 and 13563–Regulatory Review**

This regulation has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review” section 1(b), Principles of Regulation, and Executive Order 13563 “Improving Regulation and Regulatory Review” section 1(b), General Principles of Regulation.

The Department of Justice has determined that this rule is not a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Information and Regulatory Affairs within the Office of Management and Budget pursuant to Executive Order 12866.

#### **Regulatory Flexibility Act**

This regulation will only impact Privacy Act-protected records, which are personal and generally do not apply to an individual’s entrepreneurial capacity, subject to limited exceptions. Accordingly, the Chief Privacy and Civil Liberties Officer, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

#### **Executive Order 13132–Federalism**

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### **Executive Order 12988–Civil Justice Reform**

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

**Executive Order 13175–Consultation and Coordination With Indian Tribal Governments**

This regulation will have no implications for Indian Tribal governments. More specifically, it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Therefore, the consultation requirements of Executive Order 13175 do not apply.

**Unfunded Mandates Reform Act of 1995**

This regulation will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000, as adjusted for inflation, or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Congressional Review Act**

This rule is not a major rule as defined by 5 U.S.C. 804 of the Congressional Review Act.

**Paperwork Reduction Act**

This rule imposes no information collection or recordkeeping requirements.

**List of Subjects in 28 CFR Part 16**

Administrative practices and procedures, Courts, Freedom of information, Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 2940-2008, the Department of Justice amends 28 CFR part 16 as follows:

**PART 16-PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION**

1. The authority citation for part 16 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

**Subpart E – Exemption of Records Systems Under the Privacy Act**

2. Revise § 16.73 to read as follows:

**§ 16.73 Exemption of Office of Legal Policy Systems.**

(a) The Judicial Nominations Files (JUSTICE/OLP-002) system of records is exempt from subsections (c)(3); (d); (e)(1), (e)(4)(G), (H), and (I); and (f) of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), (k)(2), (k)(5), and (k)(6). The exemptions in this paragraph (a) apply only to the extent that information in this system of records is subject to an exemption, pursuant to 5 U.S.C. 552a(k). Where compliance would not appear to interfere with or adversely affect the Office of Legal Policy's (OLP's) processes, OLP may waive the applicable exemption.

(b) Exemptions from the particular subsections in paragraph (a) of this section are justified for the following reasons:

(1) From subsection (c)(3), the requirement that an accounting be made available to the named subject of a record, because release of disclosure accountings could alert the subject of an investigation and/or evaluation to the extent of an investigation and/or evaluation. Such a disclosure could also reveal investigative interests by not only OLP, but also other recipient agencies or components. Since release of such information to the subjects of an investigation would provide them with significant information concerning

the nature of the investigation and/or evaluation, release could result in the destruction of documentary evidence, improper influencing of witnesses, endangerment of the physical safety of confidential sources, witnesses, and law enforcement personnel, the fabrication of testimony, and other activities that could impede or compromise the investigation and/or evaluation. In addition, providing the individual an accounting for each disclosure could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy.

(2) From subsection (d), the access and amendment provisions, because many persons are contacted who, without an assurance of anonymity, refuse to provide information concerning the subject of an investigation and/or evaluation. Access could reveal the identity of the source of the information and constitute a breach of the promised confidentiality on the part of the Department. Such breaches ultimately would restrict the free flow of information vital to the determination of a candidate's qualifications and suitability, among other determinations. The Department also relies on certain examination materials to assess and evaluate an individual's qualifications for an applicable position. Access and/or amendment to such material could reveal information about the examination and vetting process and could compromise its objectivity and/or fairness. Access and/or amendment to such material could also inappropriately advantage future candidates with knowledge of the examination materials. Finally, providing the individual access or amendment rights could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy.

(3) From subsection (e)(1), because in the collection of information for investigative and evaluative purposes, it is impossible to determine in advance what exact information may be of assistance in determining the qualifications and suitability of the subject of an investigation and/or evaluation. Information which may seem irrelevant,

when combined with other seemingly irrelevant information, can on occasion provide a composite picture of a candidate which assists in determining whether that candidate should be nominated for appointment. Relevance and necessity are questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In interviewing individuals or obtaining other forms of information during OLP processes, information may be supplied to OLP which relates to matters incidental to the primary purpose of OLP's processes, but also relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated.

(4) From subsections (e)(4)(G) and (H), and subsection (f), because this system is exempt from the access and amendment provisions of subsection (d).

(c) The General Files System of the Office of Legal Policy (JUSTICE/OLP-003) system of records is exempt from subsections 552a(c)(3) and (4); (d); (e)(1), (2) and (3), (e)(4)(G) and (H), and (e)(5); and (g) of the Privacy Act, pursuant to 5 U.S.C. 552a(j)(2), (k)(1), (k)(2) and (k)(5). The exemptions in this paragraph (c) apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552(j), (k). Where compliance would not appear to interfere with or adversely affect OLP's processes, the applicable exemption may be waived by OLP.

(d) Exemptions from the particular subsections in paragraph (c) of this section are justified for the following reasons:

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her would reveal investigative interest on the part of the Department as well as the recipient agency. This would permit record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel.

(2) From subsection (c)(4) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(3) From subsection (d) because the records contained in this system relate to official Federal investigations. Individual access to these records might compromise ongoing investigations, reveal confidential informants, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation. Amendment of records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4) From subsections (e)(1) and (5) because in the course of law enforcement investigations, information may occasionally be obtained or introduced the accuracy of which is unclear or which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information since it may aid in establishing patterns of criminal activity. Moreover, it would impede the specific investigation process if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.

(5) From subsections (e)(2) because in a law enforcement investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be informed of the existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations and duties.

(6) From subsection (e)(3) because to comply with the requirements of this subsection during the course of an investigation could impede the information gathering process, thus hampering the investigation.

(7) From subsections (e)(4)(G) and (H) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.



(8) From subsection (g) because this system is exempt from the access and amendment provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

Dated: September 23, 2021.

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Peter A. Winn,  
Acting Chief Privacy and Civil Liberties Officer,  
United States Department of Justice.

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